IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1051

BESSIE B. GIVHAN, *Appellant,*

v.

WESTERN LINE CONSOLIDATED SCHOOL DISTRICT, *et al.,*
Appellees.

On Appeal From the United States Court of Appeals For the Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

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INTEREST OF THE AMICUS CURIAE

The decision of the Fifth Circuit panel, by removing *all* internal communication by public employees to administrators from the scope of the First Amendment, has special significance in institutions of higher learning. In such institutions, faculty members have a professional obligation to participate in governance, particularly in the formulation of educational policy. Thus, the *Statement on Government of Colleges and Universities,* jointly formulated by the American Association of University Professors, the American

Council on Education, and the Association of Governing Boards of Universities and Colleges, provides:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty. It is desirable that the faculty should, following such communication, have opportunity for further consideration and further transmittal of its views to the president or board. Budgets, manpower limitations, the time element, and the policies of other groups, bodies and agencies having jurisdiction over the institution may set limits to realization of faculty advice. *Statement on Government of Colleges and Universities,* reprinted in AAUP POLICY DOCUMENTS AND REPORTS 40, 43 (1977).

This *Statement* further provides:

> Among the means of communications among the faculty, administration, and governing board now in use are: (1) circulation of memoranda and reports by board committees, the administration, and faculty committees, (2) joint *ad hoc* committees, (3) standing liaison committees, (4) membership of faculty members on administrative bodies, and (5) membership of faculty members on governing boards. Whatever the channels of communication, they should be clearly understood and observed. *Id.* at 44.

If affirmed, the holding of the Fifth Circuit panel would have a devastating impact on academic freedom and the proper operation of our colleges and universities.

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in colleges and universities. Since its inception the Association has formulated Statements, frequently in concert with other national organizations, intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), drafted jointly with the Association of American Colleges and currently endorsed by over 100 educational organizations and learned societies. To a large extent, Association standards are recognized and relied on by faculties, administrations, and governing boards in institutions of higher education.

The Association has been deeply concerned with the constitutional protections afforded teachers and research scholars in American higher education. It has therefore participated as *amicus curiae* in cases which raise these issues. In recent years, the Association has filed briefs in this Court in *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967); and *Whitehill* v. *Elkins,* 389 U.S. 54 (1967).

The decision below implicates the First Amendment rights of all teachers and research scholars. Accordingly, as an organization deeply committed to the protection of academic freedom and civil liberties at col-

leges and universities, and broadly experienced in the special context of the campus setting, the Association believes it is uniquely situated to address this court as *amicus curiae* in the present litigation.

QUESTION PRESENTED

Does a teacher forfeit the protection of the First Amendment by expressing herself on school matters of public concern through a direct communication to her principal rather than in a public forum?

STATEMENT OF THE CASE

Appellant was a nontenured junior high school teacher whose contract was not renewed by appellee school district even though her principal acknowledged that she was a "competent teacher." Petition for Certiorari at 4a. Both the Fifth Circuit panel and the district court found that appellee's decision against reappointment was "motivated primarily" by the fact that appellant submitted to her principal a list of issues which the principal termed "demands," but which appellant and the Fifth Circuit panel characterized as requests. The panel pointed out that *all* these issues related to appellant's "concern as to the impressions on black students of the respective roles of whites and blacks in the school environment" and therefore concluded that they were "neither 'petty' nor 'unreasonable.'" *Id.* at 8a-9a. The panel also confirmed the district court's finding that

> the school district's motivation in failing to renew [appellant's] contract was almost entirely a desire to rid themselves of a vocal critic of the district's policies and practices which were capable of interpretation as embodying racial discrimination. *Id.* at 9a.

The district court concluded from this finding that the school district had violated appellant's First Amendment rights. The Fifth Circuit panel, however, denied appellant's communications *any* First Amendment protection. The panel acknowledged throughout its opinion that appellant's communications would have been protected by the First Amendment if she had expressed herself in a public forum. It stressed, however, that appellant, instead of bringing her admittedly "laudable" criticisms to "public attention," had "privately voiced" them "to her immediate superior." *Id.* at 13a, 19a. The panel concluded, without any qualifications whatsoever, that appellant's communications were outside the scope of the First Amendment because she chose to submit her grievances regarding the operation of her school directly to her principal.

SUMMARY OF ARGUMENT

The Fifth Circuit panel held that communication by a public school teacher which is otherwise protected by the First Amendment necessarily loses that protection when it is expressed directly to her principal rather than in a public forum. This erroneous holding is based on the panel's fundamental failure to distinguish legitimate intramural communication clearly within the scope of the First Amendment from expressions of merely private concerns wholly extraneous to the business of the agency. The Free Speech Clause protects the conscientious teacher who expresses her views on the operation of her school to appropriate parties within the system instead of, or before, using a public forum. The Petition Clause of the First

Amendment is an additional guarantee of free expression and grants appellant's communications to her principal *greater* constitutional protection than the Free Speech Clause standing alone.

ARGUMENT

I. Good Faith Statements by a Public Employee, Communicating Her Concerns Respecting the Proper Operation of a Public Agency Directly to the Executive Personnel of That Agency, Rather Than Externally to the Public at Large, Are Plainly Not Excluded from the Free Speech Clause.

This case is utterly anomalous. Both lower federal courts found that appellant's criticisms of the policies and practices of the school district by which she was employed "were neither petty nor unreasonable, insomuch as all the complaints in question involved employment policies and practices at Glen Allan School which appellant conceived to be racially discriminatory in purpose or effect." Petition for Certiorari at 9a. Both courts, moreover, found that *"the primary reason"* for the school district's failure to renew appellant's contract was the mere submission of this criticism to appropriate parties within the system itself (emphasis added). *Id.* at 8a. *Compare Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Despite the admitted relevance of the subject of appellant's communications to the lawful and proper operation of the school in which she taught, the Fifth Circuit panel nonetheless denied these communications *any* First Amendment protection.

The basis for this remarkable conclusion is found in the panel's error of confusing good faith communication of inquiry respecting the manner in which the agency is fulfilling its public responsibilities in lawful and proper ways, with communication of matters which may be so extraneous to the business of that agency or so trivial (*e.g.*, of such a merely gossipy nature) that they relate essentially to private concerns plainly inappropriate to pursue within the agency itself. By treating the first kind of communication as though it were wholly indistinguishable from the gratuitous nature of the second kind of communication, the Fifth Circuit panel condemned *both* as entirely beyond the concern of the First Amendment. The Fifth Circuit panel fully failed to recognize the obvious distinction. Rather, without qualification of any kind, it observed that "private [sic] expression by a public employee is not constitutionally protected." Petition for Certiorari at 16a. The court went forward to characterize appellant's expressions as "laudable," *id.* at 19a, but nonetheless *wholly* unsheltered by the First Amendment *solely* because they were "*privately* voiced . . . to her immediate supervisors" rather than carried outside, "to public attention" (emphasis added). *Id.* at 13a.

By excluding "private" communication from the categories of expression encompassed by the First Amendment, the holding of the Fifth Circuit panel punishes the public employee who, for any of a number of legitimate reasons, decides to express himself to colleagues or superiors through internal channels instead of, or before, using a public forum. Such reasons may include (but are certainly not limited to) considerations of prudence, fairness, loyalty, or poten-

tial effectiveness. A decision to speak in "private," through internal channels, may be in the best interests of the employee, his colleagues and supervisors, and the public. By affording no constitutional protection whatsoever to internal speech by government employees, the panel's holding subjects them all to unreviewable retaliatory dismissals for such speech, no matter how "laudable" the employee's reasons for choosing not to express his views in public. *Id.* at 19a. Thus, a public employee, who on prudential grounds would prefer to use internal means of communication, is forced to choose between self-censorship, which is inhibiting, and public disclosure, which may be unnecessary and unwise.

Throughout its opinion, the court assumed that appellant's communication—criticism of school policies and practices which, in her view, constituted racial discrimination—would have been protected by the First Amendment had she but presumed to carry them into a public forum, rather than to her immediate supervisor. In that case, the court indicated that it would have ordered remedial action, consistent with this Court's decision in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968) and *Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977), because the school district's decision not to renew appellant's appointment would have been motivated "almost entirely" by "a desire to rid themselves of a vocal critic." Petition for Certiorari at 9a. According to the Fifth Circuit panel, however, appellant forfeited the First Amendment protection her criticisms would have had only because she chose to communicate them directly to her principal, through an internal communication, rather than via a public

forum such as a letter to a newspaper or a telephone call to a radio talk show. *Id.* at 13a-14a. *Compare Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 282 (1977).

According to this novel theory, *all* internal communication is outside the scope of the First Amendment; *no* expression by a government employee to a colleague or supervisor receives *any* First Amendment protection unless it also reaches the public. Thus, failure to reappoint even an outstanding probationary teacher solely on the basis of a direct communication to her principal can *never* be redressed, regardless of its importance, its relevance to the professional responsibilities of the teacher and of the principal, the reasonableness of the time, place, and manner of expression, or the lack of evidence respecting any impairment of the immediate work relationship. This holding conflicts with the clear precedents of this and other courts and elevates bad policy to the level of constitutional error.

This Court has stressed the importance of affording teachers the right to "comment on matters of public interest in connection with the operation of the public schools in which they work." *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). Because "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions" regarding school matters of public importance, "it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Id.* at 572. And communication between teachers and school officials "as to the preferable manner of operating the school system . . . clearly concerns an issue of general public interest." *Id.* at 571. There

is, moreover, no suggesting in *Pickering* that this essential First Amendment freedom of teachers to express themselves on matters involving the operation of the schools is in any way dependent on whether this expression occurs in public or through internal channels. *Pickering* focused on the protected subject matter of speech, not on "where the speech happened to occur." *Pilkington* v. *Bevilacqua,* 439 F. Supp. 465, 476 (D.R.I. 1977). It emphasized the *content* rather than the *forum* of expression. *City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), similarly stressed the independent importance of the protected First Amendment right of teachers to communicate *directly* with their school board regarding the operation of the schools. This Court was especially concerned that "restraining teachers' expressions to their school board (and, by implication, to other school officials) on matters involving the operation of the schools would seriously impair the board's ability to govern the district," *id.* at 177, as well as infringe the "protected right" of teachers "to communicate with the board." *Id.* at 175 n.7.

The decision by the Fifth Circuit panel also flies in the face of this Court's careful encouragement in *Pickering* itself that the intramural communication of professionally-related concern is to be preferred. Thus, this Court observed in a footnote the possibility that in certain limited circumstances "teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the school to their superiors for action thereon prior to bringing the complaints before the public. 391 U.S. at 572 n.4. If, therefore, a public employee thinks he *ought* to

express his criticisms directly to his superiors even when not compelled to do so by local regulation, it would make no sense to discourage this preferred course of action by orphaning it under the First Amendment. One should not be punished for being more prudent than the Constitution requires. Indeed, to enact a rule requiring internal communication of professionally-related grievances prior to their public dissemination, and then to sustain nonrenewal of the employee's contract solely because of dissatisfaction with that "private" communication, is to imagine that the First Amendment can be nullified by some preposterous "Catch 22." Premature complaint to the public may furnish just cause for nonrenewal, and mere "private" communication within the system is without protection under the First Amendment? The logical outcome of the lower court's false dichotomy between "public" and "private" speech, when combined with this Court's footnoted suggestion in *Pickering,* is the complete nullification of virtually every decision this Court has addressed to the general subject. The result is frankly remarkable. It is also plainly erroneous.

A substantial number of other lower federal courts have confronted the same issue and none is in agreement with the Fifth Circuit panel. The reasoning of these lower court cases, and the facts on which they are based, provide convincing support for the principle that the protection of the First Amendment is not lost by the more conscientious public employee who voluntarily adheres to the policy which this Court itself encouraged in *Pickering.*

The Fourth Circuit, for example, ordered the reinstatement of a fireman who had been dismissed for

circulating among other firemen and presenting to the fire chief and the city manager a petition protesting the promotion of a black fireman over several whites with greater seniority. The Fourth Circuit found that the fireman "was discharged for exercising a well established and well known constitutional right." *Jannetta* v. *Cole,* 493 F.2d 1334, 1338 (4th Cir. 1974). The Seventh Circuit held that a college president "was deprived of his first amendment right to free expression" when his contract was summarily terminated for circulating among his colleagues his own confidential memorandum discussing proposed changes in the college's ethnic studies program. *Hostrop* v. *Board of Junior College District No. 515,* 471 F.2d 488, 495 (7th Cir. 1972). The Tenth Circuit held that a College violated the First Amendment rights of a faculty member by dismissing him for statements made primarily in his capacity as president or member of the executive committee of the faculty association. The court applied the *Pickering* analysis even though it recognized that these statements "were not made to the public as in *Pickering,* but were made at meetings at which only Dixie College administrators and faculty were present." *Smith* v. *Losee,* 485 F.2d 334, 338 (10th Cir. 1973). And the District of Columbia Circuit, in ordering a remand of a district court decision which had sustained the dismissal of a teacher for sending to four administrative superiors a memorandum and personal statement critical of her principal's management of her school, held that the constitutionality of these communications must be determined by applying the principles set forth in *Pickering. Ring* v. *Schlesinger,* 502 F.2d 479 (D.C. Cir. 1974).

Recent district court decisions, many of which also rely on *Pickering,* further underline that the First Amendment extends to internal communications by public employees. Thus a school district cannot, consistent with the First Amendment, discharge a teacher for bringing a health hazard directly to the attention of her principal in a "private" conversation. *Downs* v. *Conway School District,* 328 F. Supp. 338 (E.D. Ark. 1971). A state department of mental health violated the First Amendment by summarily discharging the administrator of an inpatient mental health unit for criticizing the priorities of his employer in "prudent" and "private" communications to his coemployees and superiors. *Pilkington* v. *Bevilacqua,* 439 F. Supp. 465 (D.R.I. 1977). "There is no doubt" that a college is prohibited by the First Amendment from dismissing a professor for commenting "in two brief conversations with fellow faculty members" on a report critical of his behavior. *Phillips* v. *Puryear,* 403 F. Supp. 80, 88 (W.D. Va. 1975). And a teacher is "protected by the First Amendment in complaining to her principal" that being denied a permanent room assignment "contributed to classroom inefficiency and was adversely affecting her as a teacher." *Johnson* v. *Butler,* 433 F. Supp. 531, 535 (W.D. Va. 1977). *See also Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d 827 (Cal. 1969) (teachers have a First Amendment right to circulate among colleagues petition addressed to various school and public officials regarding appropriations for higher education).

These decisions emphasize that the protection of the First Amendment is not restricted to expression in a public forum. Cases protecting internal speech by

teachers within their school system, moreover, cite the same First Amendment values emphasized by this Court in *Pickering, City of Madison,* and numerous prior decisions. Teachers must be able "to express their views on school policies and governmental actions relating to schools," *Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d at 836, and "the right of a teacher to voice concerns about conditions which interfere with the education of her students falls squarely within the protection afforded by the Constitution." *Johnson* v. *Butler,* 433 F. Supp. at 535. The right to free expression on these subjects is not dependent on whether the expression takes place in a public forum. A public employee "can not be deprived of constitutional protection because he voiced from within matters that were entirely appropriate for public discussion and of current public interest." *Pilkington* v. *Bevilacqua,* 439 F. Supp. at 475. By ignoring this reasoning, the Fifth Circuit panel removed constitutional protection from an essential category of communication. The fact that *none* of the public employees in *any* of these lower court cases would have prevailed in the Fifth Circuit suggests the potential consequences of accepting the panel's conception of the First Amendment.

Respectfully, whatever the inadvertence that misled the Fifth Circuit panel to its erroneous conclusions that no intramural communication of professionally-related concerns of public employees is within the protection of the First Amendment, the decision below must be reversed.

II. The First Amendment Right To Petition Provides Specific Additional Protection for Internal Expression by Government Employees.

The specific provision in the First Amendment guaranteeing the right "to petition the Government for a redress of grievances" provides additional authority that the constitutional protection for communication between a public employee and her supervisor does not depend on whether that communication reaches a public forum. This provision, Justice Story wrote, "was probably borrowed from the declaration of rights in England, on the revolution of 1688, in which the right to petition the king for a redress of grievances was insisted on; and the right to petition parliament in like manner has been provided for, and guarded by statutes passed before, as well as since that period." J. Story, *Commentaries on the Constitution,* Book III, § 1888, at 745 (1833). Infringement of the right to petition the king for a redress of grievances was one of eight conditions which American lawyers in the colonial period "regarded as violations of immemorial rights or liberties secured by the law of the land." R. Pound, *The Development of Constitutional Guarantees of Liberty* 71-72 (1957).

The scope of protection afforded the right to petition for a redress of grievances has always been broad, and, like "cognate" First Amendment "rights to freedom in speech and press," *Thomas* v. *Collins,* 323 U.S. 516, 530 (1944), has expanded over time. *See* Note, *Dismissals of Public Employees for Petitioning Congress: Administrative Discipline and 5*

U.S.C. Section 652 (d), 74 YALE L.J. 1156, 1164 n.44 (1965). According to Justice Story:

> The statements made in petitions addressed to the proper authority, in a matter within its jurisdiction, are so far privileged that the petitioner is not liable, either civilly or criminally, for making them, though they prove to be untrue and injurious, unless he has made them maliciously. J. Story, *Commentaries on the Constitution,* Vol. II, § 1895, at 645 n.b (5th ed. 1891).

Similarly, Professor Cooley characterized the right to petition as a "generic term" which "applies to all recommendations to office or public position or privilege, as well as to remonstrances against them, and to appeals of every sort, and for every purpose, made to the judgment, discretion, or favor of the person or body having authority in the premises." T. Cooley, *The General Principles of Constitutional Law in the United States of America* 297 (1898).

Consistent with these interpretations, this Court has held that the "grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest." *Thomas* v. *Collins,* 323 U.S. at 531. The right to petition, moreover, "extends to all departments of the Government," including "administrative agencies." *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 510 (1971).

The First Amendment "right to petition Government for a redress of grievances," as a number of courts have pointed out, affords constitutional protection to government employees who communicate their grievances directly to those in the administrative

hierarchy having authority to deal with them. Thus, for example, the Court of Claims, relying explicitly on the Petition Clause, has held that "a petition by a federal employee to one above him in the executive hierarchy is covered by the First Amendment." *Swaaley* v. *United States,* 376 F.2d 857, 863 (Ct. Cl. 1967). Accordingly, the Court of Claims held in a subsequent decision that a probationary teacher's letter to a member of the Office of Economic Opportunity complaining about racial discrimination in school employment practices was an exercise of his "First Amendment right to petition for redress of grievances" and could not provide a permissible basis for his discharge. *Jackson* v. *United States,* 428 F.2d 844, 848 (Ct. Cl. 1970). Similarly, the Supreme Court of California, in sustaining the right of teachers to circulate among colleagues a petition addressed to various school and public officials, held that "[w]here, as here, government is the desired audience, the First Amendment provides a specific constitutionally protected means for communicating effectively, the petition for redress of grievances." *Los Angeles Teachers Union* v. *Los Angeles City Board of Education,* 455 P.2d at 832. Although not specifically referring to the right to "petition," this Court in *City of Madison* invoked its values in finding that the school board's order violated the First Amendment by constituting an "effective prohibition" on teachers "from communicating with their government." 429 U.S. at 176. *See also Jannetta* v. *Cole,* 493 F.2d 1334, 1337 n.5 (4th Cir. 1974) (public employee has First Amendment right "to communicate a grievance to his superiors").

The historical development of the right to petition suggests that it applies with particular force to *direct* communications with government that do not take place in a public forum. Professor Chafee points out that both in England and America through the end of the eighteenth century, the "people could not make adverse criticism [of government] in newspapers or pamphlets, but only through their lawful representatives in the legislature, who might be petitioned in an orderly manner." Z. Chafee *Free Speech in the United States* 19 (1941). Thus, the right to petition could coexist with the law of seditious libel, which prohibited the intentional publication of criticism of public figures, laws, and institutions. *Id.* Laws punishing "seditious libel" are now, of course, prohibited by the First Amendment, *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), and courts have extended the right to petition to include expression in a public forum. *Edwards* v. *South Carolina,* 372 U.S. 229 (1963). Yet this extension has not vitiated the traditional protection the right to petition affords direct communication with government. In a significant decision, this Court held that a union leader, in writing a telegram to the Secretary of Labor threatening a strike if a judicial decree were enforced, "was exercising the right of petition . . . protected by the First Amendment." *Bridges* v. *California,* 314 U.S. 252, 277 (1941). The fact that this telegram was also published in the newspapers while litigation was still pending did not affect this Court's reasoning. *Id.* Justice Frankfurter's dissenting opinion, however, indicates the lingering strength of the view that the right to petition applies particularly to direct communication with government. According to Justice Frankfurter, even though the

right to petition may have protected the sending of the telegram to the Secretary of Labor, it did not also protect the intentional publication during litigation of the telegram in the newspapers. *Id.* at 302-03. More recently this Court, in rejecting the argument of prison inmates that "restricting their access to press representatives unconstitutionally burdens their first and fourteenth amendment rights to petition the government for the redress of grievances," not only pointed out that alternative means of communication with the press "satisfies whatever right the inmates may have to petition the government through the press," but also noted that the inmates had "substantial opportunities to petition the executive, legislative, and judicial branches of government *directly*" (emphasis added). *Pell* v. *Procunier,* 417 U.S. 817, 828-29 n.6 (1973). Thus the Fifth Circuit panel, by denying protection to communications by a school teacher to her principal because they were not made in a public forum, turns the Petition Clause of the First Amendment on its head.

This Court has held that the First Amendment right to petition protects a wide range of expression, including lobbying, *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508 (1971); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); solicitation of union members, *Thomas* v. *Collins,* 323 U.S. 516 (1944); access to legal counsel, *United Mine Workers of America, District 12* v. *Illinois State Bar Association,* 389 U.S. 217 (1967); *Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964); *NAACP* v. *Button,* 371 U.S. 415 (1963); public demonstrations, *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); and

grievances by prison inmates, *Cruz* v. *Beto,* 405 U.S. 319 (1972). The prior decisions of this and other courts, as well as the historical context in which this right arose, demonstrate that it also provides an additional (and not simply an alternative) guarantee of a teacher's freedom to communicate directly to her principal, through internal channels, about matters involving the operation of the schools. Where the right to petition is applicable, the communication of a government employee receives *greater* constitutional protection than if it were protected by the Free Speech Clause alone. The limitations on speech set forth in *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), for example, might be inappropriate if the expression is covered by the Petition Clause.

III. The Concept of a "Captive Audience" Does Not Justify the Exclusion of Internal Expression by Public Employees from Constitutional Protection.

The Fifth Circuit panel, in addition to misconstruing and misapplying the decisions of this Court dealing with the constitutional protection afforded expression by government employees, justified its holding that "private speech by a public employee is not constitutionally protected" through a misplaced reliance on the concept of a "captive audience." After asserting that "no one has a right to press even 'good' ideas on an unwilling recipient," Petition for Certiorari at 18a, the panel concluded that

> [n]either a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views, at least in the absence of evidence that the public employee was given that task by law, custom, or school board decision. *Id.* at 19a.

It is true that this Court, in a variety of contexts, has balanced "the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors," *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 208 (1975). And in balancing these two independent constitutional rights, this Court, in certain strictly limited contexts, has held that the right of privacy must prevail over freedom of expression. Thus, for example, this Court has allowed a person who receives in his home a "pandering advertisement" which he considers "erotically arousing or sexually provocative" to instruct the sender through the Postmaster that similar material must not be sent to his address in the future. *Rowan* v. *United States Post Office Department,* 397 U.S. 728 (1970). *See also Lehman* v. *City of Shaker Heights,* 418 U.S. 298 (1974) (the degree of captivity of passenger justifies the prohibition of political advertisements on city buses). According to the Fifth Circuit panel, a school principal, "in the normal course of his job," may be subject to even a greater "degree of captivity" than a person in his home or on a bus. Petition for Certiorari at 19a n.16.

The Fifth Circuit panel's comparison of communications between a school teacher and her principal to the facts in *Erznoznik* and *Lehman* reflects a fundamental misconception of the role of administrators in the public schools. The panel takes the curious view that a school principal, "in the normal course of his job," has a privacy interest which must be protected from "invasion" by comments from teachers in his school regarding issues of public importance, including teachers' professional opinions on matters within the principal's responsibilities involving the operation of the schools. Even assuming a principal is entitled to *some*

degree of privacy "in the workplace," *id.*, speech by teachers on these subjects certainly does not invade a "substantial privacy interest . . . in an essentially intolerable manner." *Erznoznik* v. *City of Jacksonville,* 422 U.S. at 210. Yet this Court has held and reiterated that only a showing under this standard permits "government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it." *Cohen* v. *California,* 403 U.S. 15, 21 (1971), quoted in *Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209-10. As this Court stressed in *Pickering* and *City of Madison,* it would be "intolerable" and would impair the proper functioning of the schools if teachers, "who are most likely to have informed and definite opinions" on the operations of the schools, lost their First Amendment right to communicate these opinions directly to their principal because of an inappropriate concern for the principal's privacy. Such a loss of constitutional protection for teachers would also render it difficult, if not impossible, for a principal properly to perform his own professional responsibilities. *See especially City of Madison* v. *Wisconsin Employment Relations Commission,* 429 U.S. at 177. Any legitimate protection of privacy could be accomplished through reasonable time, place, and manner regulations which would allow internal communication within fair limitations. *See Erznoznik* v. *City of Jacksonville,* 422 U.S. at 209; *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972).

CONCLUSION

For the reasons expressed in this brief, *amicus curiae* respectfully urges that the judgment of the Fifth Circuit panel be reversed.

Respectfully submitted,

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